

1
RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE

Oct 28, 2016, 1:16 pm

RECEIVED ELECTRONICALLY
b/h

No. 93466-5

SUPREME COURT
OF THE STATE OF WASHINGTON

Brian Rundquist, Appellant,

v.

Michael Fox, Respondent,

BRIEF OF APPELLANT

PREMIER LAW GROUP PLLC

By: Jonathan Lee
WSBA No. 42505

1408 140th Place NE
Bellevue, WA 98007
(206) 285-1743

Attorneys for Appellant Brian
Rundquist

WILLIAMS, KASTNER &
GIBBS PLLC

By: Rodney L. Umberger, Jr.
WSBA No. 24948

Jordann Hallstrom
WSBA No. 48036

Two Union Square
601 Union Street, Ste. 4100
Seattle, WA 98101
(206) 628-6600

Attorneys for Respondent Michael
Fox

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	3
II.	INTRODUCTION.....	4
III.	ASSIGNMENTS OF ERROR	5
IV.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	5
V.	STATEMENT OF CASE	6
VI.	ARGUMENT	9
	A. Standard of Review.....	9
	B. The Trial Court Erred by Accepting Defendant's Alleged Facts, Even Though Defendant Fox Was the Moving Party	10
	C. The Trial Court Also Erred by Concluding That Defendant Fox Was Served Via Mail When Plaintiff Served Defendant Through the Secretary of State in Accordance with RCW 46.64.040.....	14
VII.	CONCLUSION	15

I. TABLE OF AUTHORITIES

Cases

<i>Berge v. Gorton</i> , 88 Wn.2d 756, 567 P.2d 187 (1977)	4
<i>Corrigal v. Ball & Dodd Funeral Home</i> , 89 Wn.2d 959, 961, 577 P.2d 580, 582 (1978).....	4
<i>Cutler v. Phillips Petroleum Co.</i> , 124 Wn.2d 749, 755, 881 P.2d 216, (1994).....	10
<i>Hoffer v. State</i> , 110 Wn.2d 415, 420, 755 P.2d 781, 785 (1988).....	9
<i>Hofto v. Blumer</i> , 74 Wn.2d 321 (1968)	4
<i>Sidis v. Brodie/Dohrmann, Inc.</i> , 117 Wn.2d 325, 329, 815 P.2d 781 (1991)	9, 14
<i>Woodward v. Taylor</i> , 184 Wn.2d 911, 366 P.3d 432 (2016).....	4

Statutes

RCW 4.16.170	4, 8, 10, 11, 13, 14, 16
RCW 46.64.040	5, 6, 8, 14, 15, 16

Rules

CR 12(b)(6)	5, 9, 10
CR 15(c)	8

II. INTRODUCTION

Since the 1967 adoption of the Federal Rules of Civil Procedure in Washington State and to the present, our courts have always held that in a CR 12(b)(6) motion to dismiss, the trial court is to accept the plaintiff's allegations set forth in the complaint as being true. *See, Hofto v. Blumer*, 74 Wn.2d 321 (1968); *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977); *Corrigal v. Ball & Dodd Funeral Home*, 89 Wn.2d 959, 961, 577 P.2d 580, 582 (1978); *Woodward v. Taylor*, 184 Wn.2d 911, 366 P.3d 432 (2016).

Unfortunately, the trial court in this case deviated from that precedents by failing to accept Plaintiff Rundquist's factual allegations; instead, accepting Defendant Fox's factual allegations, even though Defendant was the moving party. Thus, Plaintiff now seeks to remedy that error. Had the trial court accepted Plaintiff's allegation that Fischer Trucking of Washington State was Defendant's employer, the trial court should have then denied Defendant's motion to dismiss. Plaintiff not only properly served the Washington State's Fischer Trucking company within the 90-day tolling window as required under RCW 4.16.170, but it also properly served Defendant Fox via the Secretary of State while the statute of limitations was tolled. Therefore, the trial court's conclusion that Defendant Fox was not served within the statute of limitations was error.

The issue before this Court is whether the trial court erred when it failed to accept Plaintiff's factual allegations as true, resulting in the trial

court's erroneous conclusion that the "wrong defendant" was served, which resulted in the granting of Defendant's motion to dismiss.

III. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to accept Plaintiff's alleged facts as true, even though Plaintiff was the non-moving party opposing Defendant's CR 12(b)(6) Motion to Dismiss. The error caused trial court to erroneously conclude that Plaintiff served "the wrong defendant" when it granted Defendant's motion to dismiss.

2. The trial court also erred when it concluded that Plaintiff served Defendant by mail, even though Plaintiff properly served Defendant by serving the Secretary of State in accordance with the non-motorist statute, RCW 46.64.040. The trial court's erroneous conclusion was the secondary reason the trial court granted Defendant's motion to dismiss.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it rejected Plaintiff's alleged facts, and instead accepted Defendant's alleged facts, even though Defendant was the moving party on his CR 12(b)(6) Motion to Dismiss.

2. Whether the trial court erred when it concluded that Plaintiff served Defendant Fox by mail, even though Plaintiff properly served Defendant by serving the Secretary of State in accordance with the non-motorist statute, RCW 46.64.040.

V. STATEMENT OF CASE

On September 4, 2012, Defendant Michael Fox was driving a semi-truck on Interstate 5 and attempted to change lanes when he struck Carlos Gutierrez Lopez's vehicle. CP 117-121. The collision caused the Lopez vehicle to lose control and collide into Plaintiff's car. *Id.* Although the police responded to the collision, the police report did not list anyone as the registered owner of the semi-truck. CP 79.

Defendant's insurance company sent a letter acknowledging the collision and identified its insured as "Fischer Trucking, Inc." CP 78. Based on this information, Plaintiff's counsel researched and found on the Washington Secretary of State's website that "Fischer Trucking" was registered with the Secretary of State as a Washington limited liability company with its principal place of business in Snohomish, Washington. *Id.* Counsel also conducted an online search for "Fischer Trucking Washington," and found the same "Fischer Trucking" in Snohomish County, Washington as identified on the Secretary of State's website. *Id.* Based on this information, Plaintiff's counsel concluded that Fischer Trucking was the registered owner of the semi-truck and Defendant's employer. *Id.* Given the fact that the collision occurred in Washington and many businesses use trade names or "doing business as" without including abbreviations or acronyms to identify the type of business entity it is,

Plaintiff's counsel thought that the insurance carrier either inadvertently included "Inc." for "LLC" or omitted "LLC" when it listed "Fischer Trucking, Inc." as its insured. *Id.*

Uncertain about the actual name of the Washington limited liability company, Plaintiff Rundquist identified the company as "Fischer Trucking, Inc., a Washington limited liability company" in his lawsuit. CP 1-5. Plaintiff also named Defendant Fox as a co-defendant in the lawsuit. *Id.* The lawsuit was filed on September 2, 2015. *Id.* In the Complaint, Plaintiff identified Fischer Trucking as both "Fischer Trucking, Inc. ... a Washington State Limited Liability Company" and "Fischer Trucking, LLC." *Id.* Moreover, Plaintiff also indicated that Fischer Trucking was "conducting business in Snohomish County, Washington." *Id.*

Fischer Trucking, LLC, was served at its principal place of business in Snohomish County on October 20, 2015, which was within 90 days of filing the lawsuit as permitted by RCW 4.16.170. CP 10. On or about December 3, 2015, Plaintiff's counsel learned that a Fischer Trucking also existed in Georgia, and thus amended his Complaint to add the Georgia company as an additional co-defendant. CP 11-15. Thereafter, on February 24, 2016, while the statute of limitations was tolled under RCW 4.16.170, Plaintiff served Defendant Fox by serving the Secretary of State in accordance with the non-resident motorist statute, RCW 46.64.040. CP 23

Defendant Fox's counsel filed his Notice of Appearance on December 29, 2015; however, Defendant did not file his Answer until May 10, 2016. CP 16-18, 27-32.

On May 26, 2016, pursuant to CR 15(a), Plaintiff Rundquist moved for leave to amend the Amended Complaint to remove the "Inc." from Fischer Trucking's name so that it would be correctly identified as "Fischer Trucking, LLC" as identified by the Secretary of State. CP 45-50. Plaintiff also requested that the amendment relate back to the date of the original filing pursuant to CR 15(c). *Id.* The trial court granted Plaintiff's motion for leave to amend, including the relation back, on June 10, 2016. CP 115-116.

Before Appellant filed his motion for leave to amend, Defendant Fox filed a Motion to Dismiss on May 19, 2016, asserting that Plaintiff's claim against him was barred by the statute of limitations. CP 33-44. Defendant contended that the Plaintiff failed to serve any proper defendants prior to the three-year statute of limitation running and also failed to name or serve a proper defendant within the 90-day tolling period based on the fact that Plaintiff included "Inc." to the name of the Washington State's Fischer Trucking company's name. *Id.* As a result, the defendant contended that the statute of limitation for him was not tolled. *Id.*

While Plaintiff's motion for leave to amend was pending, the trial court heard oral arguments regarding Defendant's motion to dismiss. RP 3-

20. In deciding to grant Defendant's motion to dismiss, the trial court stated that:

[T]he Court does not agree that serving the wrong defendant makes the case viable. Defendant Fox's motion to dismiss is granted. First of all, serving Fox by mail was never authoritative service of process without commission of the court. And second of all, there was no amendment motion before the Court.

RP 18. Based on those findings, the trial court granted Defendant Fox's Motion to Dismiss on June 3, 2016. CP 99-100.

After the trial court granted Plaintiff's motion for leave to amend the amended complaint, Plaintiff moved for reconsideration on June 13, 2016, requesting that the trial court reconsider its Order dismissing Defendant Fox. CP 122-128. The trial court denied Plaintiff's motion on July 6, 2016. CP 129. The Appellant filed a timely appeal. CP 130.

VI. ARGUMENT

A. Standard of Review

A dismissal of claims under a CR 12(b)(6) is a ruling made on a question of law, and therefore appellate review is de novo. *See, Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781, 785 (1988).

The Supreme Court has long held that "a plaintiff's allegations [in the complaint] are presumed to be true" and that "a court may consider hypothetical facts not part of the formal record." *Hoffer*, 110 Wn.2d at 420. "Therefore, a complaint survives a CR 12(b)(6) motion if *any* set of facts

could exist that would justify recovery.” *Id.* The trial court’s decision to dismiss Defendant Fox was erroneous because Plaintiff’s proper service on Fischer Trucking LLC tolled the statute of limitations as to all defendants, including Defendant Fox. RCW 4.16.170; *see also Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991).

B. The Trial Court Erred by Accepting Defendant’s Alleged Facts, Even Though Defendant Fox Was the Moving Party

When ruling on a CR 12(b)(6) motion to dismiss, the court is required to presume that all the plaintiff’s allegations, including hypothetical facts, are true. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216, (1994).

Under this rule, a plaintiff’s allegations are presumed to be true, and a court may consider hypothetical facts not part of the formal record. CR 12(b)(6) motions should be granted sparingly and with care and only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

Id.

Here, Plaintiff alleged that Fischer Trucking, LLC, of Snohomish County, Washington, was Defendant Fox’s employer. In considering Defendant’s Motion to Dismiss, the trial court was required to assume that Plaintiff’s allegation was true. Had the trial court accepted this allegation, it should have denied Defendant’s Motion because RCW 4.16.170 states:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If

service has not been had on the defendant prior to the filing of the complaint, **the plaintiff shall cause one or more of the defendants to be served personally**, or commence service by publication **within ninety days from the date of filing the complaint**. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

RCW 4.16.170 (emphasis added).

Plaintiff served Fischer Trucking, LLC on October 20, 2015, which was within the 90-day period after the complaint was filed. CP 10. Had the trial court accepted as fact that Fischer Trucking, LLC was Defendant Fox's employer as Plaintiff alleged, and Fischer Trucking LLC was served on October 20, 2015, the trial court should have concluded that the statute of limitations was tolled as to Defendant Fox, and thus service on him through the non-resident motorist statute on February 24, 2016 was effective service. CP 23. However, rather than accepting Plaintiff's alleged facts as true, the trial court erroneously accepted Defendant's contention that Plaintiff served the wrong company by including "Inc." in to the Washington limited liability company's name "Fischer Trucking LLC." RP 16. The trial court was aware that Plaintiff was seeking leave to amend this mistake, as the motion was pending, and thus should have accepted Plaintiff's contention that he intended to mean "Fischer Trucking, LLC,"

who he properly served in October 2015. RP 18. Yet, the trial court refused to accept this contention and thus granted Defendant's motion to dismiss.

Further, the trial court also erroneously accepted Defendant's other contention that the Washington limited liability company was not Defendant Fox's employer, but rather an Indiana corporation named "Fischer Trucking, Inc." was the employer. RP 9, 18. The trial court accepted this contention even though there was no admissible evidence to support it besides Defendant's counsel's inadmissible hearsay declaration, which was presented in a prior motion as well as Defendant's counsel's representation during oral argument. RP 9, 15-17; CP 136. Accepting Defendant's counsel's representation as fact, the trial court stated, "the Court does not agree that serving the wrong defendant makes the case viable." RP 18.

Had the trial court accepted Plaintiff's alleged facts as true, that the Washington Fischer Trucking, LLC, of Snohomish County, was Defendant Fox's employer (as Plaintiff believed it was), then the trial court should have concluded as a matter of law that the statute of limitations was tolled as to Defendant Fox based on Plaintiff's service of Fischer Trucking, LLC on October 20, 2015. Because the trial court failed to view the alleged facts in the light most favorable to the Plaintiff, the trial court erroneously

concluded that Plaintiff served the “wrong defendant” and erroneously granted Defendant’s Motion to Dismiss.

The trial court further compounded its error by failing to grant Plaintiff’s motion for reconsideration and reversing itself. After the trial court granted Plaintiff’s motion for leave to amend with the amendment relating back to the date of original filing, the trial court should have reversed its decision to dismiss Defendant Fox. The Second Amended Complaint corrected Fischer Trucking’s name by removing “*Inc.*” from its name, and still alleged that “Fischer Trucking, LLC” was Defendant Fox’s employer. Besides Defendant’s counsel’s representation to the contrary, there was no evidence disputing that Fischer Trucking LLC was not Defendant’s employer. The trial court should have corrected its earlier decision and reversed its dismissal of Defendant Fox from the case, yet it erroneously failed to do so. As a result, the trial court denied Plaintiff’s motion for reconsideration without an explanation for its decision.

The Plaintiff respectfully requests that this Court reverse the trial court’s decision as the trial court’s ruling contradicts long standing precedents that all facts, including hypothetical facts, should be viewed in the light most favorable to the non-moving party.

C. The Trial Court Also Erred by Concluding That Defendant Fox Was Served Via Mail When Plaintiff Served Defendant Through the Secretary of State in Accordance with RCW 46.64.040.

The statute of limitations is tolled as to all other defendants once a defendant is served within ninety days of filing the complaint. RCW 4.16.170. In interpreting this statute, the Supreme Court in *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991), stated, “the court should assume that the legislature means exactly what it says. Plain words do not require construction.” *Id.* The *Sidis* Court held that the statute was “straightforward and unambiguous” in its meaning that service of process on one defendant tolls the statute of limitations as to unserved defendants. *Id.*

Under RCW 46.64.040, a plaintiff who is unable to locate the whereabouts of a defendant driver after a due diligence search may serve the defendant driver by serving the Secretary of State in accordance with RCW 46.64.040.

Here, Plaintiff properly effected service on Defendant Fox by serving the Secretary of State in accordance with RCW 46.64.040.¹ CP 23. Plaintiff filed his lawsuit on September 2, 2015. CP 1-5. Fischer Trucking, LLC was personally served through its registered agent on October 20,

¹ Respondent did not raise any issue at the trial court level concerning Appellant’s compliance with RCW 46.64.040 to effect service on Respondent Fox.

2015, which was within 90 days of the complaint being filed. CP 10. Thereafter, during the period that the statute of limitation was tolled, Plaintiff served Defendant Fox on February 24, 2016, by serving the Secretary of State in accordance with the non-resident motorist statute, RCW 46.64.040. CP 23-26. Thus, the trial court should have concluded that Defendant Fox was properly served under the non-resident motorist statute. Yet, it erroneously concluded that Defendant Fox was served by mail. RP 18. Nothing in the record supports this conclusion. As a result, the trial court also erred by concluding that Defendant was served by mail. Therefore, this Court should reverse the decision of the trial court and remand for further proceedings.

VII. CONCLUSION

The trial court erred by dismissing Defendant Fox. It failed to presume all the Plaintiff's allegations as being true, including the allegation that Fischer Trucking, LLC was Defendant's employer.

Plaintiff properly filed his lawsuit within the statute of limitations. He properly served the summons and complaint on the co-defendant (Fischer Trucking, LLC), who he reasonably believed to be the employer of Defendant Fox, within the applicable 90-day window. Service on Fischer

Trucking, LLC tolled the statute of limitation for all other defendants, including Defendant Fox. Then, while the statute of limitations was tolled, Plaintiff had Defendant Fox properly served by serving the Secretary of State pursuant to the non-resident motorist statute, RCW 46.64.040.

The fact that Plaintiff incorrectly included "Inc." to the name of Fischer Trucking LLC should not have resulted in granting Defendant's motion to dismiss. CR 10(a)(2) allows a plaintiff to name the defendant "by any name" if the true name is unknown, which is what occurred. Furthermore, the trial court granted Plaintiff's motion for leave to amend with the amendment relating back to the date of the original filing, which remedied the issue. The trial court's failure to accept Plaintiff's alleged facts as true caused it to conclude that Plaintiff served the "wrong party."

Similarly, the trial court incorrectly concluded that Defendant was only served by mail, even though no such evidence existed to support such a conclusion. All the evidence showed that Defendant was served through the non-resident motorist statute, RCW 46.64.040, during the time the statute of limitations was tolled. Therefore, the trial court's decision should be reversed and this matter remanded back to the trial court for further proceedings.

Respectfully submitted this 28th day of October, 2016.

PREMIER LAW GROUP, PLLC

/s/Jonathan J. Lee

Jonathan Lee, WSBA #42505

Attorneys for Appellant

Brian Rundquist

Oct 28, 2016, 1:16 pm

SUPREME COURT OF THE STATE OF WASHINGTON

No. 93466-5

CERTIFICATE OF SERVICE

VS.

Respondent.

Washington State Supreme Court 415 12 th Ave. SW Olympia, WA 98501-2314 Supreme@courts.wa.gov	<input checked="" type="checkbox"/> e-filing via email <input type="checkbox"/> via messenger <input type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax
Fischer Trucking, LLC 8733 South Lake Stevens Road Lake Stevens, WA 98258	<input type="checkbox"/> via e-filing <input type="checkbox"/> via email <input type="checkbox"/> via messenger <input checked="" type="checkbox"/> via U.S. Mail

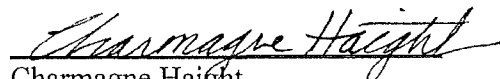
PREMIER LAW GROUP PLLC
1408 140th Place NE
Bellevue, WA 98007
(206) 285-1743 / Fax: (206) 599-6316

1 Rodney L. Umberger, Attorney at Law
2 Jordann Hallstrom, Attorney at Law
3 Williams, Kastner & Gibbs, PLLC
4 Two Union Square
5 601 Union Street, Ste. 4100
6 Seattle WA 98101-2380
7 rumberger@williamskastner.com
8 JHallstrom@williamskastner.com

☐ via e-filing
☒ via email
☒ via messenger
☐ via U.S. Mail
☐ via fax

6 I declare under penalty of perjury under the laws of the State of Washington that the
7 foregoing is true and correct.

8 DATED this 28th day of October, 2016 at Bellevue, Washington.

9 
10 Charmagne Haight
11 Paralegal to Jonathan J. Lee
12
13
14
15
16
17
18
19
20
21
22
23

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, October 28, 2016 1:17 PM
To: 'Charmagne Haight'
Cc: Steward, Jaimisha; Umberger, Rodney; Hallstrom, Jordann; Patrick Kang; Jonathan Lee
Subject: RE: Rundquist v. Fox No. 93466-5: Brief of Appellant

Rec'd 10/28/16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:

http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

Looking for the Rules of Appellate Procedure? Here's a link to them:

http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

From: Charmagne Haight [mailto:Charmagne@premierlawgroup.com]
Sent: Friday, October 28, 2016 1:08 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Steward, Jaimisha <JSteward@williamskastner.com>; Umberger, Rodney <rumberger@williamskastner.com>; Hallstrom, Jordann <JHallstrom@williamskastner.com>; Patrick Kang <patrick@premierlawgroup.com>; Jonathan Lee <Jon@premierlawgroup.com>
Subject: RE: Rundquist v. Fox No. 93466-5: Brief of Appellant

Please see attached documents submitted to Washington State Supreme Court for Rundquist v. Fox No. 93466-5, submitted by attorney Jonathan J. Lee, WSBA #42505:

1. Brief of Appellant
2. Certificate of Service

Thank you.

Regards,

Charmagne Haight, Paralegal

Premier Law Group, PLLC

1408 140th Pl. NE

Bellevue, WA 98007

P 206-285-1743

F 206-599-6316

Email charmagne@PremierLawGroup.com

The information contained in this electronic message may be privileged and confidential intended only for the use of the individual or entity named above. If you have received this communication in error, please notify us immediately by telephone (collect, if necessary) and delete any and all copies of the electronic message. Thank you.